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In The

Supreme Court of the United States

FERMIN HILARIO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Is 28 U.S.C. § 546(d), which allows federal district courts to appoint interim United States attorneys, unconstitutional because United States attorneys are principal officers who under the Appointments Clause must be appointed by the President and confirmed by the Senate?

II. Even if United States attorneys were inferior officers, does their appointment by Article III judges who hear the cases they prosecute violate the doctrine of separation of powers?

III. Does the now seven-year tenure of a judicially appointed interim United States attorney, even if it were initially valid, exceed the Appointments Clause's allowance for temporary appointments or violate congressional intent in providing a four-year term for United States attorneys under 28 U.S.C. § 541 and only interim appointments under 28 U.S.C. § 546?

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PETITION FOR WRIT OF CERTIORARI

Fermin Hilario respectfully petitions this Court for a writ of certiorari to review the order of reversal of the United States Court of Appeals for the First Circuit entered on July 17, 2000.

OPINIONS BELOW

The Order and Opinion of the United States Court of Appeals for the First Circuit is reported *United States* v. *Hilario*, 218 F.3d 19 (1st Cir. 2000) (App. 1). The Order and Opinion of the United States District Court for the District of Puerto Rico is reported *United States* v. *Peralta-Ramirez*, 83 F. Supp. 2d 263 (D.P.R. 2000) (App. 23).

STATEMENT OF JURISDICTION

The order of reversal by the United States Court of Appeals for the First Circuit was entered on July 17, 2000. 28 U.S.C. § 1254 confers jurisdiction on this Court.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article II, section 1, clause 1 of the United States Constitution:

> The Executive Power shall be vested in a President of the United States.

Article II, section 2, clause 2 of the United States Constitution (the Appointments Clause):

> He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

Article II, section 2, clause 3 of the United States Constitution (portion only):

> [H]e [the President] shall take care that the laws be faithfully executed.

28 U.S.C. § 541:

> (a) The President shall appoint, by and with the advice and consent of the Senate, a United States attorney for each judicial district.
>
> (b) Each United States attorney shall be appointed for a term of four years. On the expiration of his term, a United States attorney shall continue to perform the duties of his office until his successor is appointed and qualifies.
>
> (c) Each United States attorney is subject to removal by the President.

28 U.S.C. § 546:

> (a) Except as provided in subsection (b), the Attorney General may appoint a United

States attorney for the district in which the office of United States attorney is vacant.

(b) The Attorney General shall not appoint as United States attorney a person to whose appointment by the President to that office the Senate refused to give advice and consent.

(c) A person appointed as United States attorney under this section may serve until the earlier of –

(1) the qualification of a United States attorney for such district appointed by the President under section 541 of this title; or

(2) the expiration of 120 days after appointment by the Attorney General under this section.

(d) If an appointment expires under subsection (c)(2), the district court for such district may appoint a United States attorney to serve until the vacancy is filled. The order of appointment by the court shall be filed with the clerk of the court.

STATEMENT OF THE CASE

A. Introduction

For over seven years, Guillermo Gil has exercised the powers of United States attorney for the District of Puerto Rico. In the name of the United States of America, he determines which citizens will be prosecuted for crimes in Puerto Rico and which will not. He has never been appointed by the President or confirmed by the Senate. He was not the choice of the Attorney General, nor can

she remove him. He was appointed, as an "interim" U.S. attorney, by the district judges who hear the cases he decides to prosecute. This case questions the constitutional validity of that appointment.

B. Statement of Facts

On January 20, 1993, William Jefferson Clinton became President of the United States. In May 1993, Daniel Lopez-Romero resigned the office of United States attorney for the District of Puerto Rico, to which he had been appointed by President George H.W. Bush with the advice and consent of the Senate. *See United States* v. *Hilario*, 218 F.3d 19, 21 (1st Cir. 2000) (App. 3). By June 2000, President Clinton still had not acted to appoint a U.S. attorney for the district under the Appointments Clause of the Constitution or 28 U.S.C. § 541(a). Purporting to act under 28 U.S.C. § 546(b), Attorney General Janet Reno appointed Assistant U.S. attorney Charles Fitzwilliams to fill the vacancy. 218 F.3d at 21 (App. 3). When Fitzwilliams's appointment expired 120 days later under 28 U.S.C. § 546(c)(2), the President had yet to submit for Senate confirmation a nominee for U.S. attorney for the district. On September 9, 1993, the judges of the United States District Court for the District of Puerto Rico appointed Guillermo Gil, a Justice Department trial attorney, to be interim U.S. attorney under 28 U.S.C. § 546(d). To this day, the President has failed to appoint a U.S. attorney for the District of Puerto Rico, and Guillermo Gil continues to select and to prosecute criminal cases before the district judges who appointed him. 218 F.3d at 21 (App. 3).

C. Procedural History

On January 20, 1999, Fermin Hilario and others were indicted for drug related offenses. On November 16, 1999, he moved to dismiss the indictment, contending that Gil's judicial appointment and long tenure as interim U.S. attorney violated the Appointments Clause and the constitutional doctrine of separation of powers, contravened the intent of the interim appointment statute, and rendered the indictment a nullity. 218 F.3d at 22 (App. 4); *United States* v. *Peralta-Ramirez*, 83 F. Supp. 2d 263, 263-64 (App. 23-24). The district court did not reach the constitutional issues. Rather, to avoid declaring 28 U.S.C. § 546(d) unconstitutional, the court held that Gil's then six-year service violated congressional intent in providing a four-year term for U.S. attorneys in 28 U.S.C. § 541 and providing for temporary interim appointments in § 546(d). 218 F.3d at 21 (App. 3); 83 F. Supp. 2d at 269-70 (App. 40-41). The court determined that Gil's authority to prosecute under 28 U.S.C. § 547 was invalid, as was the authority flowing from him to the Assistant U.S. attorney in this case. The court granted Hilario's motion to dismiss the indictment. 83 F. Supp. 2d at 271 (App. 41).

The United States appealed, and on July 17, 2000 the Court of Appeals for the First Circuit reversed, determining that Gil's lengthy tenure did not violate the plain meaning of 28 U.S.C. § 541 or § 546 and that his judicial appointment under § 546(d) did not violate either the

Appointments Clause or separation-of-powers principles. 218 F.3d at 21, 29 (App. 2, 22).[1]

REASONS FOR GRANTING THE WRIT

I. The court of appeals has decided important questions of constitutional law that have not been, but should be, settled by this Court.

This case presents the most important questions under the Appointments Clause and the constitutional doctrine separating executive and judicial powers that the Court has confronted since *Morrison* and *Edmond*.[2] It asks whether United States attorneys are principal officers who under the Constitution must be appointed by the President and confirmed by the Senate. It asks whether the Constitution permits Article III judges to appoint the U.S. attorney to select and prosecute the criminal cases they hear – a person who has no limit on the scope or term of his powers and who cannot be removed or replaced by any principal officer, only the President.

These questions have split district courts.[3] The two courts of appeals to address them have found in this

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[1] Hilario has been represented by counsel appointed by the district court. Because of the important constitutional issues involved, Counsel of Record in this Court appears *pro bono publico*.

[2] *Edmond* v. *United States*, 520 U.S. 651 (1997); *Morrison* v. *Olson*, 487 U.S. 654 (1988).

[3] *Compare United States* v. *Peralta-Ramirez*, 83 F. Supp. 2d 263 (D.P.R. 2000) (App. 23) (holding that continued service of U.S.

Court's *Morrison* and *Edmond* opinions only a "modicum of guidance" and, indeed, two distinct approaches that lower courts must somehow "manage[ ] to reconcile."[4] Commentators likewise debate whether the Court in *Edmond* turned its back on the "functionalism" of the majority opinion in *Morrison* and instead adopted the "formalism" of the dissent.[5]

These are not arid jurisprudential issues; they strike at the core of a Republic founded on separation of powers. "The leading Framers of our Constitution viewed the principle of separation of powers as the central guarantee of a just government. James Madison put it this way: 'No political truth is certainly of greater intrinsic

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attorney violated interim appointment statute in order to avoid finding statute violated Constitution) *and United States* v. *Gantt*, 194 F.3d 987 (9th Cir. 1999) (reversing district court holding interim appointment unconstitutional) *with United States* v. *Sotomayor Vazquez*, 69 F. Supp. 2d 286, 289 (D.P.R. 1999) (holding continued service of U.S. attorney Gil constitutionally valid, though finding "scant guidance" to resolve the issue).

[4] *Hilario*, 218 F.3d at 25 (App. 11), *citing Gantt*, 194 F.3d at 999 n.6.

[5] *See, e.g.*, William N. Eskridge, Jr., *Relationships Between Formalism and Functionalism in Separation of Powers Cases*, 22 HARV. J.L. & PUB. POL'Y 21 (1998); Steven G. Calabresi, *The Structural Constitution and the Countermajoritarian Difficulty*, 22 HARV. J.L. & PUB. POL'Y 3 (1998); Nick Braven, Note, *Is Morrison* v. *Olson Still Good Law? The Court's New Appointments Clause Jurisprudence*, 98 COLUM. L. REV. 1103 (1998) (concluding that under *Edmond* approach, independent counsel statute upheld in *Morrison* is unconstitutional); Lee S. Liberman, *Morrison* v. *Olson: A Formalistic Perspective on Why the Court was Wrong*, 38 AM. U. L. REV. 313 (1989).

value or is stamped with the authority of more enlightened patrons of liberty.' "[6] In particular they believed "there is no liberty if the power of judging be not separated from the legislative and executive powers."[7]

Gil's fulfilling the duties of U.S. attorney has enabled the President and his administration to escape the political damage the Framers envisioned would ensue from failure to appoint an appropriate chief law enforcement officer for a federal district. It has deprived the Senate of its right and responsibility of Advice and Consent. It has deprived citizens of their right to a public hearing and public accountability. It has allowed federal district judges – a collective body constitutionally unaccountable to the public – to appoint the executive officer who will bring the criminal cases they decide. It has undermined the public's basic faith in an independent judiciary as a check on executive power.

II. 28 U.S.C. § 546(d), which allows federal district courts to appoint interim United States attorneys, is unconstitutional because United States attorneys are principal officers who under the Appointments Clause must be appointed by the President and confirmed by the Senate.

The Appointments Clause is more than a matter of "etiquette or protocol." *Buckley* v. *Valeo*, 424 U.S. 1, 125

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[6] *Freytag* v. *Comm'r*, 501 U.S. 868, 870 (1991) (*quoting* THE FEDERALIST No. 47, at 324 (James Madison) (J. Cook ed. 1961)).

[7] 1 MONTESQUIEU, SPIRIT OF THE LAWS 181, as quoted in THE FEDERALIST No. 78, p. 523 (Alexander Hamilton) (J. Cooke ed. 1961), *quoted in Young* v. *United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 824 (1981) (Scalia, J., concurring in judgment).

(1976). It is an essential aspect of the separation of powers "woven into the [Constitution]." *Id.* at 124. It is "among the significant structural safeguards of the constitutional scheme." *Edmond*, 520 U.S. at 659.

The Clause serves two goals. It "is a bulwark against one branch aggrandizing its power at the expense of another branch." *Ryder* v. *United States*, 515 U.S. 177, 182 (1995). But it also provides accountability, which ensures "a higher quality of appointments." *Edmond*, 520 U.S. at 659. "The Framers understood . . . that by limiting the appointment power, they could ensure that those who wielded it were accountable to political force and the will of the people." *Freytag* v. *Comm'r*, 510 U.S. 868, 884 (1991). They envisioned that "[t]he blame of a bad nomination would fall upon the president singly and absolutely. The censure of rejecting a good one would lie entirely at the door of the senate." *Weiss* v. *United States*, 510 U.S. 163, 186 (1994) (Souter, J., concurring) (quoting THE FEDERALIST No. 77 (Alexander Hamilton)); *see also Edmond*, 520 U.S. at 660 ("By requiring the joint participation of the President and the Senate, the Appointments Clause was designed to ensure public accountability for both the making of a bad appointment and the rejection of a good one.").

The "structural benefits" of the Appointments Clause can thus be violated not only by aggrandizement but also by abdication. "[N]o branch may abdicate its Appointments Clause duties. Congress, for example, may not authorize the appointment of a principal officer without Senate confirmation; nor may the President allow Congress or a lower level Executive Branch official to select a principal officer." *Weiss*, 510 U.S. at 188 (Souter, J., concurring).

Thus, wholly apart from judicial aggrandizement of power (or separation of powers discussed below), Gil's appointment by the district court and his continued service have enabled the President to abdicate his constitutional duty to make capable appointments. It has deprived the Senate of its right and responsibility to review a nominee. It has deprived the public of its right to a public hearing in order to weigh and hold the President and Senate accountable for their decisions. Indeed, the appointment by federal judges – acting collectively – is devoid of any accountability the Framers instilled in the Appointments Clause: it takes place in secret; the federal judges who effect the appointment are constitutionally immune from political accountability by virtue of their lifetime tenure; and the responsibility for the appointment is shared by a tribunal rather than being exercised by an individual. The Framers were particularly wary of "the lack of accountability in a multimember body" with the power of appointment. *Freytag*, 501 U.S. at 904-05 (Scalia, J., concurring) (citing 1 WORKS OF JAMES WILSON 359-60 (J. Andrews ed. 1896)).[8]

If U.S. attorneys are principal officers of the United States, they must be appointed by the President with the advice and consent of the Senate. Avoidance of this constitutional mandate constitutes an abdication of duties to

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[8] Department heads were empowered to appoint subordinates because, "[l]ike the President, these individuals possess a reputational stake in the quality of the individuals they appoint; . . . they are directly answerable to the President, who is responsible to his constituency for their appointments and has the motive and means to assure faithful actions by his direct lieutenants." *Freytag*, 501 U.S. at 907 (Scalia, concurring).

which neither branch can agree. "[T]he structural interests protected by the Appointments Clause are not those of any one branch of Government but of the entire Republic," and "[n]either Congress nor the Executive can agree to waive th[e] structural protection[s] the Clause provides." *Weiss*, 510 U.S. at 189 (Souter, J., concurring) (quoting *Freytag*, 510 U.S. at 880).

In the Judiciary Act of 1789, the First Congress, which included many of the Framers of the Constitution, established the office of U.S. attorney, then called "district attorney." Act to Establish the Judicial Courts of the United States, ch. 20, § 35, 1 Stat. 93 (1789). Plainly regarding them as principal officers, Congress provided that "The President, by and with the advice and consent of the Senate, shall appoint" the federal district attorneys. The historical notes to 28 U.S.C. § 541(a) confirm that its predecessor's language was intended "to conform [this] section with the Constitution." *Accord* Comment, *Prosecutorial Discretion and the United States Congress: Expanding Jurisdiction of the Independent Counsel*, 77 KY. L.J. 923, 937 (1989) ("The language of the statute is clearly intended to comport with the Appointments Clause.").

The power of U.S. attorneys to select the cases and defendants they prosecute has aptly been described as "awesome," held in check by presidential accountability:

> The prosecutors who exercise this awesome discretion are selected and can be removed by a President, whom the people have trusted enough to elect. Moreover, when crimes are not investigated and prosecuted fairly, nonselectively, with a reasonable sense of proportion, the

> President pays the cost in political damage to his administration.

Morrison, 487 U.S. at 729 (Scalia, J., dissenting) (citing ROBERT JACKSON, THE FEDERAL PROSECUTOR, ADDRESS DELIVERED AT THE SECOND ANNUAL CONFERENCE OF UNITED STATES ATTORNEYS (April 1, 1940)).

Under the factors this Court delineated in *Morrison*, U.S. attorneys remain principal, not inferior, officers:

> Most recently, in *Morrison* . . . we held that the independent counsel created by provisions of the Ethics in Government Act of 1978 was an inferior officer. In reaching that conclusion, we relied on several factors: that the independent counsel was subject to removal by a higher officer (the Attorney General), that she performed only limited duties, that her jurisdiction was narrow, and that her tenure was limited.

Edmond, 520 U.S. at 661 (citations omitted).

None of these factors is true of a judicially appointed interim U.S. attorney. He cannot be removed by the Attorney General – only by the President. 28 U.S.C. § 541(c); 3 U.S. Op. Off. Legal Counsel 448, 1979 WL 16614 (Nov. 26, 1979) (only the President, not the Attorney General, can remove a judicially appointed U.S. attorney). Neither his duties nor his jurisdiction is limited; a U.S. attorney "within his/her district, has plenary authority" with regard to all federal criminal matters. 7 DEPARTMENT OF JUSTICE MANUAL § 9-2.000 (1999) ("JUSTICE MANUAL"). His tenure is unlimited. Indeed, Gil is now in his seventh year of office – three years beyond the four-year statutory

term for a "permanent" U.S. attorney appointed by the President and confirmed by the Senate. 28 U.S.C. § 541(b).

The court of appeals, in "manag[ing] to reconcile" *Morrison* and *Edmond*, effectively determined that the *Morrison* factors are no longer relevant and that the Court in *Edmond* replaced them with a single overriding factor – supervision. The court of appeals therefore agreed with the Department of Justice lawyers that U.S. attorneys are inferior officers because they are subject to supervision by the Attorney General. 218 F.3d at 25 (App. 11-12).[9]

But this Court has never overruled *Morrison*, and, as certain of its members have instructed, "[i]t does not follow . . . that if one is subject to some supervision and control, one is an inferior officer. Having a superior officer is necessary for inferior officer status, but not sufficient to establish it." *Edmond*, 520 U.S. at 667 (Souter, J., concurring). "To be sure, it is not a sufficient condition

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[9] Historically, this certainly has not been true. Under the Judiciary Act of 1789, district attorneys had complete authority over criminal law enforcement in their respective districts. The Attorney General was not authorized to provide any supervision. "In fact, the Attorney General had no staff, bought his own pencils and paper, and provided his own office." Susan Low Bloch, *The Early Role of the Attorney General In Our Constitutional Scheme: In the Beginning There Was Pragmatism*, 1989 DUKE L.J. 561, 566 (1989) (citations omitted). In 1861, Congress for the first time enacted legislation, now codified at 28 U.S.C. § 518, giving the Attorney General the authority to "conduct and argue any case in which the government is interested, in any court of the United States," as well as some measure of control over the district attorneys. *See United States* v. *Hawthorne*, 449 F. Supp. 1048, 1051 (S.D. Cal. 1978) (citation omitted), *aff'd*, 626 F.2d 87 (9th Cir. 1980).

for 'inferior' officer status that one be subordinate to a principal officer. Even an officer who is subordinate to a department head can be a principal officer." *Morrison*, 487 U.S. at 722 (Scalia, J., dissenting). Key to the analysis are the duties, jurisdiction, and tenure associated with the office. *Morrison*, 487 U.S. at 671-72; *Edmond*, 520 U.S. at 667-68 (Souter, J., concurring). "The Solicitor General of the United States, for example may well be a principal officer, despite his statutory 'inferiority' to the Attorney General." 520 U.S. at 668.

Even if *Edmond* completely did away with the *Morrison* factors, it does not support the conclusion that U.S. attorneys are inferior officers. In *Edmond*, the Court held that judges of the Coast Guard Court of Criminal Appeals are inferior officers. The Court emphasized that the Judge Advocate General may "remove a Court of Criminal Appeals judge from his judicial assignment without cause. The power to remove officers, we have recognized, is a powerful tool." 520 U.S. at 664 (citations omitted). No principal officer, not even the Attorney General, has the power to remove an interim U.S. attorney. It resides solely in the President. This Court has never held any officer to be inferior who could not be removed – either with or without cause – by some principal officer below the President of the United States.

The office of U.S. attorney is analogous to that of United States ambassadors, who under the express language of the Constitution are principal officers who must be appointed by the President and confirmed by the Senate. Ambassadors are subject to substantial supervision by the Secretary of State. *See* 22 U.S.C. §§ 2656, 3952. As recent events demonstrate, the State Department can

effectively suspend an ambassador's power to act. *See, e.g., U.S. Envoy to Israel Relieved of Post Over Security Issues*, N.Y. TIMES, Sept. 23, 2000 <http://www.nytimes.com/2000/09/23/world/23ENVO/html> ("The department suspended the security clearance of Martin Indyk, United States ambassador to Israel, . . . said . . . the State Department spokesman."); *Security Clearance of U.S. Ambassador to Israel is Suspended*, WASH. POST, Sept. 23, 2000, at A11 <http:www.washingtonpost.com/wp-dyn/articles/A64977-200Sep22.html> ("The suspension bars Indyk from handling classified materials, requires him to be escorted inside the State Department building and makes it virtually impossible for him to conduct his job . . . Secretary of State Madeline K. Albright approved of the suspension . . . .").

The First Congress provided for departmental supervision of ambassadors and consuls, though they were principal officers under the newly ratified Constitution. *See* Act of July 27, 1789, ch. 4, § 1, 1 Stat. 28, 29 (creating Department of Foreign Affairs); Act of Sept. 15, 1789, ch. 14, § 1, 1 Stat. 68 (changing name to Department of State). By contrast, the First Congress did not provide for supervision of district attorneys. *See supra* n.9.

Despite State Department supervision, ambassadors remain the official representatives of the United States and the President in their appointed countries. Likewise, "[t]he United States Attorney is the representative . . . of a sovereignty," *Young* v. *United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 803 (1987) (quoting *Berger* v. *United States*, 295 U.S. 78, 88 (1935)), who "within his/her district, has plenary authority." JUSTICE MANUAL, *supra*; 28 U.S.C. § 515(a) (U.S. attorneys are separately "authorized

by law" to prosecute federal crimes). Most important, ambassadors can be removed from office only by the President. *See Goldwater* v. *Carter*, 617 F.2d 697, 704 (D.C. Cir. 1979). So too U.S. attorneys. Representing the United States and ultimately answerable only to the President, U.S. attorneys and ambassadors alike are principal officers.

III. Even if United States attorneys were inferior officers, their appointment by Article III judges who hear the cases they prosecute violates the doctrine of separation of powers.

Even if U.S. attorneys were inferior officers, that would not end the constitutional inquiry:

> We do not mean to say that Congress' power to provide for interbranch appointments of "inferior officers" is unlimited. In addition to separation-of-powers concerns, which would arise if such provisions for appointment had the potential to impair the constitutional functions assigned to one of the branches, . . . Congress' decision to vest the appointment power in the courts would be improper if there was some "incongruity" between the functions normally performed by the courts and the performance of their duty to appoint.

Morrison, 486 U.S. at 675-76 (citations omitted); *see Weiss*, 510 U.S. at 187 (Souter, J., concurring) (appointment of inferior officers can be assigned to courts of law "where appropriate"). The Framers admonished that separation of powers would be compromised if the other branches

could appoint executive officers. THE FEDERALIST NO. 51 (James Madison); NO. 72 (Alexander Hamilton).

This Court has held repeatedly that criminal prosecution is purely an executive function. *E.g., Young*, 481 U.S. 800; *Heckler* v. *Chaney*, 470 U.S. 821, 832 (1985); *Buckley* v. *Valeo*, 424 U.S. 1, 138 (1976). The power to prosecute derives from the President's duty under Article II to "take Care that the Laws be faithfully executed." The Executive has "exclusive authority and absolute discretion to decide whether to prosecute a case." *United States* v. *Nixon*, 418 U.S. 683, 693 (1974).

Courts have long recognized that judicial involvement in prosecution endangers separation of powers. "The judicial power . . . includes the power to serve as a neutral adjudicator in a criminal case, but does not include the power to seek out law violators in order to punish them – which would be quite incompatible with the task of neutral adjudication." *Young*, 487 U.S. at 816 (Scalia, J., concurring in judgment). "Prosecution and judgment are two quite separate functions in the administration of justice; they must not merge." *United States* v. *Marzano*, 149 F.2d 923, 926 (2d Cir. 1945) (L. Hand, J.); *see In re Richards*, 52 F. Supp. 2d 522, 528 (D.V.I. 1999) (separation of powers violated by court's appointment of attorney to prosecute case the U.S. attorney declined to pursue), *rev'd on other grounds*, 213 F.3d 773 (3d Cir. 2000).

Appointment of a U.S. attorney is an inherently political function. "Under our system of government, the primary check against prosecutorial abuse is a political one." *Morrison*, 487 U.S. at 729 (Scalia, J., dissenting). Judicial participation in the selection of a prosecutor forces a

judge to "adopt a pro-government perspective which is ill-suited to his obligation to be neutral in the courtroom." *In re Application of President's Comm'n on Organized Crime*, 763 F.2d 1191, 1197 (11th Cir. 1985) (holding Article III judges' participation in commission on organized crime violated separation of powers). Moreover, appointment by a panel of judges, rather than the President or a principal officer accountable to the President, compromises the political check the Framers envisioned. "[I]f there is anything wrong with the selection, there is effectively no one to blame." *Morrison*, 487 U.S. at 729-30 (Scalia, J., dissenting). "The legality of Gil's abnormally long tenure as an interim appointee is controversial," *United States* v. *Torres-Rosa*, 209 F.3d 4, 6 (1st Cir. 2000), and has brought judges under incongruous scrutiny for the acts of their appointee. *United States* v. *Gonzalez-Gonzalez*, 136 F.3d 6, 10 (1st Cir. 1998) (noting "a long history of improper statements in closing argument from federal prosecutors in Puerto Rico").

Once appointed by the judiciary, the interim U.S. attorney has all of the discretion and policymaking authority that the position entails: "Law enforcement is not automatic. It isn't blind. One of the greatest difficulties of the position of prosecutor is that he must pick his cases, because no prosecutor can even investigate all of the cases in which he receives complaints." ROBERT JACKSON, THE FEDERAL PROSECUTOR, ADDRESS DELIVERED AT THE SECOND ANNUAL CONFERENCE OF UNITED STATES ATTORNEYS (April 1, 1940), *quoted in Morrison*, 487 U.S. at 727-28 (Scalia, J., dissenting). And "[i]f the prosecutor is obliged to choose his case, it follows that he can choose his defendants." *Id.*

The policymaking function of a U.S. attorney was highlighted recently when an Assistant U.S. attorney sued Gil to be relieved of the duty of prosecuting protestors for trespassing at the United States Naval Base on the island of Vieques. *See Mendoza Toro* v. *Gil*, 110 F. Supp. 2d 28 (D.P.R. 2000) (holding Assistant U.S. attorney lacked First Amendment right to decline to work on specific cases). Whether the Navy should vacate or resume bombing Vieques is an issue of intense public concern in Puerto Rico and the nation. *See Judge Rejects Request to Stop Navy Manuevers*, HOUSTON CHRONICLE, Oct. 12, 2000, at 5A. The decision to prosecute civilians protesting against the military falls squarely within the executive function and must not be compromised by interbranch appointments. It underscores the incongruity of having the appointment of such a high-level policymaker made by a collective body of judges who are constitutionally unaccountable to the public.

As with its Appointments Clause analysis, the Court in *Morrison* relied on several factors to hold that judicial appointment of independent counsel under the Ethics in Government Act did not contravene separation of powers. Application of those same factors compels the opposite conclusion for interim United States attorneys.

First, the Court accepted that appointment authority under the Ethics in Government Act had to be vested other than in the Executive Branch, because of "conflicts of interest that could arise in situations when the Executive Branch is called upon to investigate its own high-ranking officers. If [Congress] were to remove the appointing authority from the Executive Branch, the most

logical place to put it was in the Judicial Branch." *Morrison*, 487 U.S. at 677. No intra-Executive Branch conflict exists here, but rather a vacancy that could be filled easily by the Attorney General.

Second, and most important, the Ethics in Government Act expressly provides that the appointing judges are disqualified from hearing any matters brought by the independent counsel:

> In the light of the Act's provision making judges of the Special Division ineligible to participate in any matters relating to the independent counsel they have appointed, we do not think that appointment of the independent counsel by the court runs afoul of the constitutional limitation on "incongruous" interbranch appointments.

487 U.S. at 677; *see also id.* at 684 ("[T]he judges are sufficiently isolated by these statutory provisions . . . so as to avoid any taint on the independence of the Judiciary such as would render the Act invalid under Article III."). In sharp contrast, the judges who appointed Gil are the same ones who hear and decide the cases he brings on behalf of the United States.

Third, the Court deemed the judicial appointment power under the Ethics in Government Act to be merely "incidental." *Id.* at 679. The Special Division judges have "no power to appoint an independent counsel *sua sponte*," but can do so only "upon the specific request of the Attorney General." *Id.* at 695. The judges can do nothing if the Attorney General declines to seek appointment of an independent counsel. *Id.* Here, the district judges of Puerto Rico chose to act precisely because the President and the Attorney General did not.

Moreover, the independent counsel's powers are limited "by the factual circumstances that gave rise to the Attorney General's investigation and request for the appointment of the independent counsel in the particular case." *Id.* at 679. There is no limit on the powers of a U.S. attorney appointed by district judges.

The government and the court of appeals mistakenly relied on two recognized instances in which courts may appoint attorneys: to prosecute contempt charges and to represent indigent criminal defendants. These precedents do not persuade, for they involve the exercise of *judicial* power – not the selection of an officer to exercise *executive* power.

This Court has upheld judicial appointment of special prosecutors to pursue contempt of court charges. In so doing, the Court stressed that "initiation of contempt proceedings to punish disobedience to court orders is *part of the judicial function*." *Young*, 481 U.S. at 795 (emphasis added). The Court expressly distinguished "execution of the criminal law in which only the Executive Branch may engage," *id.* at 800, and admonished that "the limited authority of courts to appoint contempt prosecutors thus provides no principle that can be wielded to eradicate fundamental separation-of-powers boundaries." *Id.* at 800 n.10; *see also id.* at 816-17 (Scalia, J., concurring in the judgment).

In *Morrison*, the Court acknowledged "the longstanding judicial practice of appointing defense attorneys for individuals who are unable to afford representation notwithstanding the possibility that the appointed counsel may appear in court before the judge who appointed

him." 487 U.S. at 677 n.14. The court of appeals was correct that such an appointment is "a necessary step for judges to take in order to provide for fair process." 218 F.3d at 28 (App. 20). But the court was mistaken in concluding that the "rationale applies to the appointment of interim United States attorneys with equal force." *Id.* at 28-29 (App. 20).[10]

Assuring due process is the constitutional duty of the *judiciary*. "Upon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused. . . . The trial court should protect the right of an accused to have the assistance of counsel." *Glasser* v. *United States*, 315 U.S. 60, 71 (1942); *see also Powell* v. *Alabama*, 287 U.S. 45, 71 (1932) (holding that the failure of a trial court "to make an effective appointment of counsel" is "a denial of due process" and observing that "it is the duty of the court, whether requested or not, to assign counsel for [the defendant] as a necessary requisite of due process of law").

Appointing defense counsel as a check against executive power and to assure fairness in the judicial process is plainly an exercise of *judicial* power. It is not an executive function. "The executive branch is the prosecutor. While it must be solicitous of the rights of defendants, it is not defense counsel, and this court cannot shift to the executive branch that which is *fundamentally the constitutional duty of the judiciary*." *United States* v. *Decoster*, 624 F.2d

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[10] In *Morrison*, the Court noted without discussion that "[l]ower courts have also upheld interim judicial appointments of United States Attorneys," 487 U.S. at 676 (citing *United States* v. *Sullivan*, 216 F. Supp. 835 (S.D.N.Y. 1963)).

196, 507 (D.C. Cir. 1979) (en banc) (MacKinnon, J., dissenting) (emphasis added).

Just as fundamentally, it is not the constitutional duty of the judiciary to see that the laws are enforced. The Constitution assigns that function to the President, whose power is delegated to the U.S. attorney in each federal district. *Young*, 487 U.S. at 800. Appointing the person to exercise that executive power crosses the "fundamental boundary" separating executive from judicial powers. Judges' selecting the person who will prosecute the cases they hear undermines – if not destroys – fundamental faith in the independence of the judiciary, which alone legitimizes its power. "The judicial power . . . does not include the power to seek out law violators in order to punish them – which would be quite incompatible with the task of neutral adjudication." *Id.* at 816 (Scalia, J., concurring in the judgment).

IV. Even if initially valid, the now seven-year tenure of a judicially appointed United States attorney cannot be justified as temporary under the Appointments Clause, and it violates congressional intent in providing a four-year term for United States attorneys under 28 U.S.C. § 541 and interim appointments under 28 U.S.C. § 546.

In *Morrison* the Court summarized:

> In *Eaton* . . . we approved Department of State regulations that allowed executive officials to appoint a "vice-consul" during the *temporary* absence of the consul, terming the "vice-consul" a "subordinate officer" notwithstanding the Appointment Clause's specific reference to

> "Consuls" as principal officers. As we stated: "Because the subordinate officer is charged with the performance of the duty of the superior *for a limited time* and *under special and temporary conditions* he is not thereby transformed into the superior and permanent official."

487 U.S. at 672-73 (emphasis added) (quoting *United States* v. *Eaton*, 169 U.S. 331, 343 (1898)).

U.S. attorney Gil has now held office for more than seven years – three years beyond the statutory term Congress provided for a U.S. attorney appointed by the President and confirmed by the Senate. 28 U.S.C. § 541(b). It cannot be argued plausibly that his service is "temporary" or "for a limited time" or "under special and temporary conditions." Indeed, even the court of appeals declined to treat him any differently from a permanent U.S. attorney. 218 F.3d at 29 (App. 14).

To avoid the constitutional issues, the district court held that Gil's then six-year service violated congressional intent in providing a four-year term for U.S. attorneys in 28 U.S.C. § 541 and providing for temporary interim appointments in § 546(d). 218 F.3d at 21 (App. 1-2); 83 F. Supp. 2d at 269-70 (App. 36-37). The court of appeals rejected this conclusion, based on the plain meaning of § 546(d), which expresses no limit on the tenure of a judicially appointed interim U.S. attorney. 218 F.3d at 23 (App. 6-7).

Courts do not hesitate to supply reasonable temporal or other limits when appropriate or necessary to avoid a constitutional defect. *See In re Grand Jury Proceedings*, 673 F. Supp. 1138, 1143 n.11 (D. Mass. 1987) (interpreting § 546(c) to prohibit Attorney General from renominating

interim U.S. attorney after lapse of 120 days, though statute is silent on this issue).

In *Williams* v. *Phillips*, 482 F.2d 669 (D.C. Cir. 1973), the court implied a time limit on the appointment of an acting Director of the Office of Economic Opportunity. 42 U.S.C. § 2941(a) requires the Director to be appointed by the President and confirmed by the Senate. The President's interim appointee had served for four-and-a-half months when the court invalidated the appointment. The court held that an "indefinite" interim appointment violated the statute. 482 F.2d at 671. (Indeed, the government conceded that the President could not designate an interim Director "indefinitely." *Id.*) Adopting the thirty-day limit set by the Vacancies Act, 5 U.S.C. § 3348, the court determined that thirty days was a "reasonable" limit on the congressionally intended tenure of an interim Director.

The legislative history of 28 U.S.C. § 546 confirms that Congress intended a judicially appointed interim U.S. attorney to serve only until the President's nominee was confirmed. 132 Cong. Rec. H11294 (daily ed. Oct. 17, 1986) (discussing § 69 of S.1236), *cited in In re Grand Jury Proceedings*, 673 F. Supp. at 1143 n.11. The plain language of the statute limits the Attorney General's interim appointee to 120 days. 28 U.S.C. § 546(c). If U.S. attorneys are inferior officers, as the government argues and the court of appeals held, it only is because the Attorney General is their "superior" officer. Especially in light of the separation-of-powers issues raised above, Congress could not have intended to empower federal judges to appoint interim U.S. attorneys for terms longer than that allowed the Attorney General. Much less could Congress

have intended that judges appoint the U.S. attorney in their district to serve longer than the four-year term allowed a U.S. attorney appointed by the President and confirmed by the Senate. 28 U.S.C. § 541(a).

That the President has the unexercised power to end the tenure of U.S. attorney Gil does not alter the analysis. The legislature creates the office, and if indeed U.S. attorneys are inferior officers, the legislature must vest the appointment in an appropriate constitutional manner. Permitting the federal courts to appoint U.S. attorneys of unlimited tenure on the presumption that the Executive will eventually choose to intervene is not an appropriate or constitutional exercise of the legislative power, and it is not what Congress intended.

CONCLUSION

For these reasons, the Court should issue a writ of certiorari to review the order of the Court of Appeals for the First Circuit.[11]

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[11] The court of appeals did not reach the government's argument that even if Gil's appointment were invalid, Hilario's indictment should not be dismissed. 218 F.3d at 29 n.6. (App. 22). That issue will need to be addressed below if the case is remanded. This Court has held that a defendant who timely challenges his conviction by an unconstitutionally appointed officer is entitled to relief. "Any other rule would create a disincentive to raise Appointments Clause challenges . . . ." *Ryder* v. *United States*, 515 U.S. 177, 183 (1995). *Accord Landry* v. *Federal Deposit Ins. Corp.*, 204 F.3d 1125 (D.C. Cir.) (successful Appointments Clause challenge requires reversal, because errors are structural and because it would be nearly impossible to prove prejudice arising from the error), *cert. denied*, 2000 U.S. Lexis 6606 (Oct. 10, 2000). Whether invalidation of Gil's appointment affects other indictments or convictions under his reign, or whether it is to have prospective effect only, raises other issues. *Ryder*, 515 U.S. at 183-85. Whatever its ultimate impact, "[f]iat justitia, ruat coelum." *Morrison*, 487 U.S. at 732 (Scalia, J., dissenting).

United States Court of Appeals,
First Circuit.

UNITED STATES of America, Appellant,
v.
Fermin HILARIO, Defendant, Appellee.

No. 00-1406.

Heard June 9, 2000.
Decided July 17, 2000.

Elizabeth D. Collery, Attorney, United States Dep't of Justice, with whom Guillermo Gil, United States Attorney, and Miguel A. Pereira, Assistant United States Attorney, were on brief, for appellant.

Maria H. Sandoval, by appointment of the court, for appellee.

G. Richard Strafer, with whom Barbara Bergman and G. Richard Strafer, P.A. were on brief, for National Ass'n of Criminal Defense Lawyers, amicus curiae.

Before SELYA, Circuit Judge, CAMPBELL, Senior Circuit Judge, and LIPEZ, Circuit Judge.

SELYA, Circuit Judge.

Fermin Hilario moved to dismiss an indictment brought against him, claiming that the protracted tenure of a court-appointed interim United States Attorney contravened applicable federal statutes, violated the Appointments Clause, offended the separation-of-powers principle and, in the end, rendered the indictment a nullity. The court below did not reach Hilario's constitutional claims but nonetheless granted his motion, ruling that the interim United States Attorney's extended service flouted congressional intent. The government

appeals on an expedited basis. Concluding that the interim United States Attorney holds his office lawfully, we reverse.

I. BACKGROUND

As a general rule, United States Attorneys are nominated by the President and, if confirmed by the Senate, serve four-year terms. *See* 28 U.S.C. § 541.[1] But Congress selected a different method for interim appointees:

> (a) Except as provided in subsection (b), the Attorney General may appoint a United States attorney for the district in which the office of United States attorney is vacant.
>
> (b) The Attorney General shall not appoint as United States attorney a person to whose appointment by the President to that office the Senate refused to give advice and consent.
>
> (c) A person appointed as United States attorney under this section may serve until the earlier of –
>
> > (1) the qualification of a United States attorney for such district appointed by the President under section 541 of this title; or
> >
> > (2) the expiration of 120 days after appointment by the Attorney General under this section.

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[1] If willing and able, a United States Attorney, upon the expiration of his four-year term, "shall continue to perform the duties of his office until his successor is appointed and qualifies." 28 U.S.C. § 541(b).

> (d) If an appointment expires under subsection (c)(2), the district court for such district may appoint a United States attorney to serve until the vacancy is filled. . . .

Id. § 546.

Thus, when the United States Attorney for the District of Puerto Rico resigned in May of 1993, Attorney General Janet Reno appointed an Assistant United States Attorney (AUSA), Charles Fitzwilliams, to fill the resulting vacancy. Because the President failed to name a replacement within 120 days, Fitzwilliams's appointment lapsed and the position once again became vacant. *See id.* § 546(c)(2). On September 9, 1993, the judges of the United States District Court for the District of Puerto Rico responded to the exigency and appointed a career Justice Department lawyer, Guillermo Gil, as interim United States Attorney. *See id.* § 546(d). Although more than six years have passed, the President has yet to nominate a United States Attorney. Thus, Gil continues to serve in an interim capacity.

As the length of Gil's tenure increased, criminal defendants began to challenge his authority. Most of these challenges failed. *See, e.g., United States v. Ruiz Rijo*, 87 F.Supp.2d 69, 70-72 (D.P.R.2000); *United States v. Santana*, 83 F.Supp.2d 224, 230-32 (D.P.R.1999); *United States v. Sosa*, 78 F.Supp.2d 20, 21 (D.P.R.1999); *United States v. Sotomayor Vazquez*, 69 F.Supp.2d 286, 296 (D.P.R.1999); *see also United States v. Torres-Rosa*, 209 F.3d 4, 6 (1st Cir.2000) (finding issue procedurally defaulted); *United States v. Colon-Munoz*, 192 F.3d 210, 216 (1st Cir.1999) (similar). Hilario broke the spell; he convinced a district judge to declare Gil's appointment unlawful and to grant his

motion to dismiss a drug-trafficking indictment in a multi-defendant case. *See United States v. Peralta-Ramirez*, 83 F.Supp.2d 263, 271 (D.P.R.2000). This timely appeal followed.[2]

II. ANALYSIS

Jurisdictional issues have primacy of place in appellate review, *see Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998); *United States v. Swiss Am. Bank, Ltd.*, 191 F.3d 30, 46 (1st Cir.1999), so we first address Hilario's claim that we lack jurisdiction over the government's appeal. Next, because "[i]t has long been a basic tenet of the federal courts to eschew the decision of cases on constitutional grounds unless and until all other available avenues of resolution were exhausted," *Aggarwal v. Ponce Sch. of Med.*, 745 F.2d 723, 726 (1st Cir.1984), we discuss whether (as the district court concluded) Gil's appointment and continued service, singly or in combination, frustrate the statutory scheme. Because we find no statutory violation, we proceed to consider whether the Appointments Clause renders Gil's service unconstitutional. Concluding that it does not, we mull the most difficult question in the case: whether the appointment offends the separation-of-powers principle. Finally, we analyze whether the statute authorizing Gil's service is unconstitutional as applied to

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[2] The other defendants in the case were not affected by the court's order. Predictably, however, they soon emulated Hilario's example (with identical results). Parallel appeals are now pending, but those appeals have been stayed pending our decision.

this situation. Throughout, our review is plenary. *See United States v. Stokes*, 124 F.3d 39, 42 (1st Cir.1997); *United States v. Nippon Paper Indus. Co.*, 109 F.3d 1, 3 (1st Cir.1997).

A. Appellate Jurisdiction.

Hilario maintains that this court lacks jurisdiction to hear and determine the government's appeal because the notice of appeal was signed by unauthorized personnel (Gil and an AUSA in his office). We find this remonstrance unpersuasive.

Even assuming, for argument's sake, that the district court correctly divined Gil's incapacity to perform the functions of the office that he purports to hold – an assumption that, in the last analysis, proves untenable, *see* infra Part II(B)-(E) – Hilario's jurisdictional argument fails. There is no requirement that the United States Attorney personally sign a notice of appeal. *See* generally Fed. R.App. P. 3(c). Thus, the AUSA's signature was sufficient to validate the notice. We explain briefly.

AUSAs are themselves representatives of the government. Because they are appointed directly by the Attorney General, *see* 28 U.S.C. § 542, their ability to act does not hinge on the authority of the local United States Attorney, but derives from the Attorney General's plenary power over litigation to which the United States is a party, *see id.* § 516. To cinch matters, the decision to appeal in a criminal case is made not by the local United States Attorney but by the Solicitor General, see 28 C.F.R. § 0.20(b) – a person whose authority is not in doubt.

For these reasons, we hold that an infirmity in the appointment of the United States Attorney – even if one existed – would neither invalidate the notice of appeal nor strip this court of appellate jurisdiction. *See United States v. Gantt*, 194 F.3d 987, 998 (9th Cir.1999).

B. Statutory Construction.

The court below determined that, by holding office for so long a period, Gil had become the de facto United States Attorney without having to run the gauntlet prescribed in section 541(a). *See Peralta-Ramirez*, 83 F.Supp.2d at 269. This rendered his continuing service unlawful, the court concluded, because Congress could not have intended to allow an interim appointee to serve as United States Attorney for upwards of six years – an interval that far exceeds the statutory term for a regular United States Attorney – without being nominated by the President and confirmed by the Senate. *See id.* at 271. We disagree with this conclusion.

The language of an unambiguous statute typically determines its meaning. *See Freytag v. Commissioner*, 501 U.S. 868, 873, 111 S.Ct. 2631, 115 L.Ed.2d 764 (1991); *Dickerson v. New Banner Inst., Inc.*, 460 U.S. 103, 110, 103 S.Ct. 986, 74 L.Ed.2d 845 (1983). That is, "if the plain language of the statute points unerringly in a single direction, an inquiring court ordinarily should look no further." *Lopez-Soto v. Hawayek*, 175 F.3d 170, 172 (1st Cir.1999).

The language of section 546(d) is direct and to the point. In contrast to section 546(c)(2), which limits the Attorney General's interim appointment to a maximum of

120 days, section 546(d) specifies that the court's interim appointee shall "serve until the vacancy is filled." There is no limit on the duration of this service (other than the nomination and confirmation of a regular United States Attorney). The absence of any temporal limit strikes us as deliberate, rather than serendipitous, especially in view of the contrast between adjacent sections of a single statute. *See King v. St. Vincent's Hosp.*, 502 U.S. 215, 218-21, 112 S.Ct. 570, 116 L.Ed.2d 578 (1991). This construction becomes irresistible when one considers that Congress did not give the President a deadline before which he must "appoint, by and with the advice and consent of the Senate, a United States attorney for each judicial district." 28 U.S.C. § 541(a).

These two pieces of the statutory scheme fit together tongue and groove. In such circumstances, it is the court's role to give effect to plain meaning rather than to decide whether some other formulation might have been preferable as a matter of policy. Consequently, we decline Hilario's invitation to rewrite the statutory scheme by inserting a temporal limit into either of the two provisions we have mentioned. Instead, we read section 546(d) forthrightly to allow a judicial appointee to serve until the vacancy is filled, whenever that may be.

Of course, there are limits to the tyranny of plain language. *See Church of the Holy Trinity v. United States*, 143 U.S. 457, 459, 12 S.Ct. 511, 36 L.Ed. 226 (1892); *see also Greenwood Trust Co. v. Massachusetts*, 971 F.2d 818, 825 (1st Cir.1992) (explaining that "the plain-meaning doctrine is not a pedagogical absolute"). Courts sometimes have been persuaded to soften the text of a statute if giving it literal effect would yield an absurd result, *see, e.g., Green*

v. Bock Laundry Mach. Co., 490 U.S. 504, 510-11, 109 S.Ct. 1981, 104 L.Ed.2d 557 (1989), or would countermand a clear expression of contrary legislative intent, *see, e.g., Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 455-65, 109 S.Ct. 2558, 105 L.Ed.2d 377 (1989). Here, however, neither of these exceptions applies. The legislative history is uninformative, and reading the statute as written establishes a sensible framework that tends to prevent the passage of lengthy periods of time without a United States Attorney in place. Congress may well have determined that it would be worse for a district to be without a United States Attorney than for the district to have one who had not been nominated and confirmed in the ordinary course, no matter how long the interim appointment lasted. The plausibility of this presumed intent, which comports with the statute's plain language, precludes reading the law to mean something other than what it says.

We add a coda. We recognize that it is counterintuitive for a temporary official to remain in office for so extended a period. If we were writing on a pristine page and wished to devise a template for the appointment of United States Attorneys, we might design it differently. But harboring such doubts "is not to find equivocation in the statute's silence, so as to render it susceptible to interpretive choice." *King*, 502 U.S. at 220, 112 S.Ct. 570. The unvarnished fact is that section 546(d) does not limit the duration of the service of court-appointed interim United States Attorneys. If Congress decides to proscribe the type of long-running interim appointment that has occurred here, it has the means to do so. In the absence of such a restriction, however, we are constrained to hold

that Gil's lengthy tenure as the interim United States Attorney does not contradict the statutory scheme.

C. The Appointments Clause.

We turn now to Hilario's constitutional arguments (which the district court did not have occasion to reach). We deal first with the claim that section 546(d) offends the Appointments Clause.

The Appointments Clause states that:

> "[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."

U.S. Const. art. II, § 2, cl. 2. In practice, then, the Clause makes nomination and confirmation the requisite appointment protocol for what have come to be known as "principal officers" of the United States but allows Congress to permit a limited class of officials to appoint "inferior officers" without the need for confirmation. *See Edmond v. United States*, 520 U.S. 651, 659-60, 117 S.Ct. 1573, 137 L.Ed.2d 917 (1997).

Congress has placed the power to appoint interim United States Attorneys in the Attorney General and in the district court, successively. *See* 28 U.S.C. § 546. Since

the Appointments Clause permits such delegation only for inferior officers, the constitutionality of this section depends, in the first instance, on how United States Attorneys should be classified.

Hilario and the amicus assert that all United States Attorneys are principal officers and therefore must be nominated by the President and confirmed by the Senate. They add that, even if interim United States Attorneys are inferior officers, regular United States Attorneys are not – and the unusual length of Gil's service has transformed him into a de facto United States Attorney. The government favors a different taxonomy, urging us to categorize all United States Attorneys, howsoever appointed, as inferior officers.

Two recent Supreme Court cases offer a modicum of guidance on the distinction between principal and inferior officers. In *Morrison v. Olson*, 487 U.S. 654, 108 S.Ct. 2597, 101 L.Ed.2d 569 (1988), the Court determined that an independent counsel was an inferior officer because her duties were limited, her performance of them was cabined by the policies of the Department of Justice, her jurisdiction was confined to particular matters, her tenure was restricted to the time it took to complete her assignment, and she held office subject to removal by the Attorney General (indicating that she was inferior to the Attorney General in rank and authority, even though she was not subordinate to him). *See id.* at 671-72, 108 S.Ct. 2597. In so holding, the Court eschewed a precise formula for determining whether an officer is "inferior," declaring that it had no need to "decide exactly where the line falls between [principal officers and inferior officers]." *Id.* at 671, 108 S.Ct. 2597.

In *Edmond*, the Court defined the term "inferior officer" as encompassing those "whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate." 520 U.S. at 663, 117 S.Ct. 1573. Given that independent counsels are not subject to such supervision, there is some tension between this definition and the Court's earlier holding in *Morrison*.[3] The *Edmond* Court did not overrule *Morrison*, however, but cited it as precedent. *See id.* at 661, 108 S.Ct. 2597.

The Ninth Circuit, when called upon to decide whether the judicial appointment of an interim United States Attorney passed muster under the Appointments Clause, managed to reconcile the two opinions. The court noted that independent counsels are inferior despite limited supervision, and suggested "that supervision by a superior officer is a sufficient but perhaps not a necessary condition to the status of inferior officers." *Gantt*, 194 F.3d at 999 n. 6.

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[3] Commentators have noted the awkwardness of the fit. *See, e.g.*, Steven G. Calabresi, *The Structural Constitution and the Countermajoritarian Difficulty*, 22 Harv. J.L. & Pub. Pol'y 3, 5 (1998) ("[T]he Court's 1997 decision in *Edmond v. United States* essentially displaced the faulty Appointments Clause analysis of *Morrison v. Olson*."); Nick Bravin, Note, *Is Morrison v. Olson Still Good Law? The Court's New Appointments Clause Jurisprudence*, 98 Colum. L.Rev. 1103, 1117-20 (1998). Moreover, the *Edmond* definition – drafted by Justice Scalia – bears a striking similarity to his dissent in *Morrison*. *See Morrison*, 487 U.S. at 719, 108 S.Ct. 2597 (Scalia, J., dissenting) (hypothesizing that " 'inferior' means 'subordinate' ").

We find this approach persuasive.[4] Accordingly, we conclude that United States Attorneys are to be regarded as inferior officers if their work is "directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate," *Edmond*, 520 U.S. at 663, 117 S.Ct. 1573, and, if not, might still be considered inferior officers if the nature of their work suggests sufficient limitations of responsibility and authority, *see Morrison*, 487 U.S. at 671-72, 108 S.Ct. 2597. Measured against those benchmarks, United States Attorneys are inferior officers.

Congress has ceded to the Attorney General plenary authority over United States Attorneys. *See* 28 U.S.C. § 519; *see also id.* § 516 (reserving litigation on behalf of the United States to officers of the Department of Justice "under the direction of the Attorney General"). They are subject to much closer supervision by superiors than, say, the judges of the Coast Guard Court of Criminal Appeals, whom the *Edmond* Court classified as inferior officers "by reason of the supervision [of others] over their work." 520 U.S. at 666, 117 S.Ct. 1573. The Attorney General can remove a United States Attorney from participation in particular cases whenever she believes that it would be "in the interests of the United States" to do so. 28 U.S.C.

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[4] To be sure, this synthesis conflicts with certain comments expressed in non-majority opinions, *see Edmond*, 520 U.S. at 667, 117 S.Ct. 1573 (Souter, J., concurring); *Morrison*, 487 U.S. at 722, 108 S.Ct. 2597 (Scalia, J., dissenting) – but conflicts of this kind are to be expected; elsewise, there would have been no need for a Justice to write separately in the first place. For our part, we are content to leave the nuances laid out in separate opinions for the Justices.

§ 518(b). Indeed, she is empowered to determine the location of a United States Attorney's offices, *see id.* § 545(b), to direct that he file reports, *see id.* § 547(5), to fix his salary, *see id.* § 548, to authorize his office expenses, *see id.* § 549, and to approve his staffing decisions, *see id.* § 550. Under so pervasive a supervisory regime, United States Attorneys plainly pass the *Edmond* test. Accord *Gantt*, 194 F.3d at 999-1000.

This is not to say that every indicator points in the same direction. For example, as Hilario and his amicus emphasize, the Attorney General does not have the authority to discharge a United States Attorney. But this fact, standing alone, does not tip the balance. Although the "power to remove officers . . . is a powerful tool for control," *Edmond*, 520 U.S. at 664, 117 S.Ct. 1573, it is not a necessary adjunct to the exercise of control. In all events, the case law does not require "control" by a superior officer, but only direction and supervision. *See id.* at 663, 117 S.Ct. 1573. Given the Attorney General's broad array of supervisory powers, the absence of the power of removal is not fatal to the government's position in this case. *See Gantt*, 194 F.3d at 1000.

The amicus makes a further point. Historically, the officers who held positions equivalent to that of the modern United States Attorney were quite independent. Therefore, the amicus argues, those officers must not have been the kind that the Framers had in mind when they described "inferior officers." This argument misses the mark. An officer's status as inferior or principal is not absolute, but relative to those around him. If Congress designs a government position in order to provide a supervisor for a group of officers who formerly were

independent, those officers become inferior to the new officer. That is precisely what happened here. As it stands now, the law places United States Attorneys under the direction and supervision of the Attorney General. No more is exigible to show that United States Attorneys – and a fortiori interim United States Attorneys – are inferior officers.

D. Separation of Powers.

Because United States Attorneys are inferior officers, Congress as a theoretical matter can entrust their appointment to the President, the head of a department, or the courts of law, without requiring Senate confirmation. *See* U.S. Const. art. II, § 2, cl. 2; *see also Ex parte Siebold*, 100 U.S. 371, 397-98, 25 L.Ed. 717 (1879) (holding that the Constitution contains no flat prohibition against interbranch appointments). We say "theoretical" because Congress's ability to choose among these three options is limited by the separation-of-powers principle. The Constitution establishes three coequal branches of government, and the doctrine of separated powers serves to eliminate arrangements that threaten to permit one branch either to aggrandize its power or to encroach on functions reserved for another branch. *See Mistretta v. United States*, 488 U.S. 361, 381-82, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989). In this instance, Congress chose to place the appointing power vis-a-vis interim United States Attorneys partially in the judiciary. *See* 28 U.S.C. § 546(d). If authorizing judges to make such appointments is incongruous with the appointers' judicial duties or unduly interferes with the proper functioning of the Executive Branch, any appointments so made would be

null and void. *See Morrison*, 487 U.S. at 675-76, 108 S.Ct. 2597; *Siebold*, 100 U.S. at 398, 25 L.Ed. 717.

Of course, section 546(d) cannot be said to violate the separation-of-powers principle simply because it requires two branches of government to interact. "[W]hile our Constitution mandates that 'each of the three general departments of government [must remain] entirely free from the control or coercive influence, direct or indirect, of either of the others,' the Framers did not require – and indeed rejected – the notion that the three Branches must be entirely separate and distinct." *Mistretta*, 488 U.S. at 380, 109 S.Ct. 647 (quoting *Humphrey's Executor v. United States*, 295 U.S. 602, 629, 55 S.Ct. 869, 79 L.Ed. 1611 (1935)); accord *Morrison*, 487 U.S. at 674-75, 108 S.Ct. 2597 (using executive and legislative appointment of judges to illustrate that the Constitution permits interbranch appointments). Rather, the district court's appointment power over interim United States Attorneys "is not unconstitutional unless Congress has vested in the [judges] powers that are more appropriately performed by the other Branches or that undermine the integrity of the Judiciary." *Mistretta*, 488 U.S. at 385, 109 S.Ct. 647.

The phrasing of this condition suggests the need for a bifurcated inquiry. First, we must ask whether Congress, in vesting the power to appoint interim United States Attorneys in the district court, conferred upon the judges a power that usurped the prerogatives of another branch of government and, thus, "effected an unconstitutional accumulation of power within the Judicial Branch." *Id.* at 383, 109 S.Ct. 647. Second, we must ask whether the exercise of the power to appoint somehow impedes the proper functioning of the Judicial Branch. *See id.* We

caution against attempting to answer these questions in a vacuum. It is not for the courts to determine the best or most efficient repository for a power of appointment vis-a-vis inferior officers. The Constitution specifies that the members of Congress should delegate the appointment power "as they think proper." U.S. Const. art. II, § 2, cl. 2. It follows, then, that Congress's choice always deserves appreciable deference. *See Siebold*, 100 U.S. at 397-98 (explaining that, "as the Constitution stands, the selection of the appointing power, as between the functionaries named, is a matter resting in the discretion of Congress"). It is against this backdrop that we mount the requisite inquiry.

Hilario maintains that it is inappropriate for judges to appoint interim United States Attorneys because they serve within the Executive Branch and their efforts are devoted exclusively to the work of that Branch. The premise of this argument is questionable: while United States Attorneys are admittedly part of the Executive Branch, they also are officers of the court who serve the Judicial Branch. Cf. *id.* at 397 (describing hybrid role of marshals). In filling a vacancy in the office, judges ensure not only the enforcement of the laws but also an effective adversarial process.

More importantly, the judicial appointment of interim United States Attorneys does not impermissibly encroach on executive powers. In *Morrison*, the Court discerned no "inherent incongruity about a court having the power to appoint prosecutorial officers." 487 U.S. at 676, 108 S.Ct. 2597. It added that "in light of judicial experience with prosecutors in criminal cases, it could be said that courts are especially well qualified to appoint

prosecutors." *Id.* at 676 n. 13, 108 S.Ct. 2597. We find it difficult, if not impossible, to distinguish *Morrison* on this point.

What is more, our system of government rests on the assumption that officers can be independent of their appointers. *See, e.g., Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 58-60, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982); Humphrey's Executor, 295 U.S. at 625-26, 55 S.Ct. 869. Were this not so, all interbranch appointments would be barred. Here, the power to appoint is tempered in ways that ensure the appointee's independence. In this regard, we deem it especially significant that section 546(d) neither grants the judges of the district court authority to supervise or remove an interim United States Attorney whom they have appointed nor gives them power to determine (or even influence) how the appointee will enforce the laws. Cf. *Morrison*, 487 U.S. at 681, 108 S.Ct. 2597 (emphasizing appointing judges' lack of supervisory authority). Under those circumstances, it is unreasonable to think that merely making an interim appointment impermissibly entangles judges in the functioning of the Executive Branch.

This is particularly so because, insofar as interim United States Attorneys are concerned, the Executive Branch holds all the trump cards. For one thing, the President may override the judges' decision and remove an interim United States Attorney. *See* 28 U.S.C. § 541(c). For another thing, the President retains the right to nominate a United States Attorney whose confirmation by the Senate automatically will oust the interim appointee. *See id.* § 546(d). Even short of presidential involvement, the

Attorney General can shunt the interim appointee to one side on any given investigation or case. *See id.* § 518. These features make it crystal clear that the district court's appointment of an interim United States Attorney is not an unconstitutional encroachment on executive authority.

The second screen for separated powers deals with whether the arrangement in question impedes the functioning of the appointing branch. Hilario tells us that section 546(d) fails this half of the test. In his view, asking a judge to choose a prosecutor forces the judge to "adopt a pro-government perspective which is ill-suited to his obligation to be neutral in the courtroom." *In re Application of the President's Comm'n on Organized Crime*, 763 F.2d 1191, 1197 (11th Cir.1985) (*PCOOC*).[5]

We are frank to admit that section 546(d) lacks some of the safeguards that courts have relied on in the past when they have determined that the impartiality of the

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[5] Hilario's argument derives from *PCOOC*, a case which held that judges' participation in the President's Commission on Organized Crime was unconstitutional because of the likelihood that it would affect either the judges' neutrality or litigants' perceptions of it. *See PCOOC*, 763 F.2d at 1197-98. The Third Circuit, however, subsequently reached a different result, noting that any bias could be dissipated by recusals in particular cases. *See In re President's Comm'n on Organized Crime*, 783 F.2d 370, 381 (3d Cir.1986). And both of these decisions preceded the Supreme Court's ruling that judges' membership in the Sentencing Commission did not violate the separation-of-powers principle. *See Mistretta*, 488 U.S. at 412, 109 S.Ct. 647. In light of this history, we deem *PCOOC*'s persuasive force uncertain.

Judicial Branch would not be affected by judges' performing interbranch assignments. *See, e.g., Morrison*, 487 U.S. at 683-84, 108 S.Ct. 2597 (reasoning that judges' role in appointing an independent counsel did not threaten the impartial adjudication of cases because the judges in question had no authority to review the independent counsel's actions and because they were disqualified from participating in judicial proceedings involving the independent counsel); *In re President's Comm'n on Organized Crime*, 783 F.2d 370, 381 (3d Cir.1986) (upholding judges' participation in a presidential commission on the basis that they could recuse themselves from related cases). Furthermore, in this situation, unlike in *Mistretta*, 488 U.S. at 393-94 & n. 20, 109 S.Ct. 647, Congress gave the nonjudicial power to the district court as a whole, not to an independent agency that happens to have judicial members. These differences weigh in Hilario's favor, but there is no silver bullet here: the decision that we must make – whether the judiciary's integrity is adversely affected because the district court has chosen to engage (as a court) in the task of selecting an interim United States Attorney, yet the judges hear cases brought by their appointee on a regular basis – depends on a wide array of facts and circumstances and how they fit together. We turn directly to that decision.

The Supreme Court has indicated in straightforward terms that having judges appoint prosecutors will not, in and of itself, impugn the judiciary's institutional integrity. Indeed, the *Morrison* Court used the judicial appointment of interim United States Attorneys to illustrate that the task is not incompatible with judicial functions. *See Morrison*, 487 U.S. at 676-77, 108 S.Ct. 2597. In a related

vein, the Court noted "the longstanding judicial practice of appointing defense attorneys for individuals who are unable to afford representation . . . notwithstanding the possibility that the appointed attorney may appear in court before the judge who appointed him." *Id.* at 677 n. 14, 108 S.Ct. 2597.

This history is directly relevant to our analysis. In context, the appointment of defense counsel for indigent criminal defendants would seem to be a necessary step for judges to take in order to provide for fair process. That rationale applies to the appointment of interim United States Attorneys with equal force. It is in keeping with preserving the institutional integrity of the judiciary that judges, faced with an indefinite vacancy in the office of United States Attorney, seek out a competent lawyer to represent the government. Cf. *Young v. United States ex rel. Vuitton et Fils*, 481 U.S. 787, 800-01, 107 S.Ct. 2124, 95 L.Ed.2d 740 (1987) (holding that, when the Executive Branch defaults, a district court has the authority to appoint a prosecutor for contempt proceedings in order "to preserve respect for the judicial system itself"). Like judges' participation in the Sentencing Commission, judges' appointment of an interim United States Attorney assists the functioning of the court: at bottom, it assures the skillful processing of cases in which the United States is a party. *See Mistretta*, 488 U.S. at 407-08, 109 S.Ct. 647. And, moreover, just as judicial appointment of defense counsel has not fostered the belief that courts are biased in favor of either the lawyers whom they appoint or the criminal defendants whom those lawyers represent, so too judicial appointment of a prosecutor is unlikely to

foster the belief that the court is biased in favor of the government.

In sum, we do not believe that section 546(d), by giving courts the option of naming an interim United States Attorney to avoid a vacancy, undermines public confidence in the disinterestedness of the Judicial Branch. The judiciary's integrity is not affected, and the method of appointment does not violate the doctrine of separated powers.

E. The As-Applied Challenge.

We have one more bridge to cross. Hilario strives to persuade us that, due to the inordinate length of Gil's service as interim United States Attorney, section 546(d), even if not facially unconstitutional, is unconstitutional as applied here. We are not convinced.

Of course, an inferior officer can stand in for a principal officer. *See, e.g., United States v. Eaton*, 169 U.S. 331, 343, 18 S.Ct. 374, 42 L.Ed. 767 (1898). Should the stand-in remain so long in office that he became indistinguishable from the latter, an argument could be made that his continued service required nomination by the President and confirmation by the Senate. Here, however, no principal officers are involved. *See supra* Part II(C) (determining that United States Attorneys are inferior officers). Congress could therefore decide to delegate the appointment of United States Attorneys to district courts as a general matter. And if that is so, we are unable to see how the duration of Gil's tenure affects the constitutionality of his appointment at all. We hold that it does not.

III. CONCLUSION

We need go no further.[6] While we are at a loss to explain the failure to fill this important position, that is a political matter and, as such, falls outside our ken. Confining our analysis – as we must – to the justiciable issues raised by the parties, we conclude for the reasons elucidated here that Gil's appointment and continued service as interim United States Attorney for the District of Puerto Rico comply with 28 U.S.C. § 546(d), the Appointments Clause, and the doctrine of separated powers. Consequently, the indictment against Hilario was duly authorized. It should not have been dismissed.

Reversed.

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[6] The government argues, with considerable force, that even if Gil does not lawfully hold office, the district court nonetheless erred in dismissing the indictment. For obvious reasons, we need not reach that argument.

United States District Court,
D. Puerto Rico.

UNITED STATES of America, Plaintiff,
v.
Elvin PERALTA-RAMIREZ, Carmelo Mercado-Ortiz, Jose Edgardo Medina, Jorge Luis Ortiz-Delgado, Fermin Hilario, Defendants.

No. Crim. 99-0016CCC.

Feb. 11, 2000.
As Amended Feb. 14, 2000.

Guillermo Gil, U.S. Attorney, Miguel A. Pereira, Assistant U.S. Attorney, Hato Rey, PR, for plaintiff.

Maria H. Sandoval, Howard Srebnick, for defendants.

ORDER

CEREZO, District Judge.

The Court has before it the Motion to Dismiss the Indictment filed by defendant Fermin Hilario on November 16, 1999 (docket entry 99), and the government's response filed on January 18, 2000 (docket entry 114). Mr. Hilario contends that the appointment of Mr. Guillermo Gil-Bonar as interim United States Attorney for the District of Puerto Rico made by the Judges of this Court on September 9, 1993, pursuant to 28 U.S.C. § 546(d), is unconstitutional on several grounds and argues that Gil-Bonar's participation in this case renders the Superseding Indictment pending against him null and void.

The issues raised in this case have been considered in other criminal proceedings before this Court and at the appellate level in *United States v. Colon-Munoz*, 192 F.3d

210 (1st Cir.1999). In the latter case, the Court defined the issues relevant to the constitutionality or legality of the September 9, 1993 appointment of Mr. Gil-Bonar as interim United States Attorney by this Court pursuant to 28 U.S.C. § 546(d). Of the five issues stated by the Court of Appeals in its April 9, 1999 Order, the parties in this case have addressed with particular emphasis those described under items 2 and 3 of the Order:

> 2. Whether 28 U.S.C. § 546 violates the Appointments Clause of the United States Constitution, art. 2, § 2, cl. 2 and the principle of separation of powers, on its face or as applied in the circumstances of this case. . . .
>
> 3. Even if the statute is constitutional, does the length of the interim appointment of the United States Attorney violate Congress' intent in enacting 28 U.S.C. § 541, 546?

Although considering these to be "serious issues," the Court found that they had not been timely raised since Mr. Colon made the constitutional challenge to the judicial appointment of Mr. Guillermo Gil-Bonar as the interim United States Attorney for the District of Puerto Rico for the first time in his motion for judgment of acquittal. *Colon-Munoz*, 192 F.3d at p. 219.

At the district court level, the constitutional challenge was also raised in ***United States v. Sotomayor Vazquez***, 69 F.Supp.2d 286 (D.P.R.1999), where defendant claimed that the length of Mr. Gil-Bonar's interim appointment constitutes a de facto permanent appointment in violation of the Appointments Clause and the doctrine of separation of powers. The decision striking down that challenge was adopted by another Judge of

this Court in *United States v. Sosa*, 78 F.Supp.2d 20 (1999) (1999 WL1256301, District of Puerto Rico, December 6, 1999), without an independent discussion. We shall later address the parts of the ***Sotomayor*** analysis which are relevant to the resolution of the motion to dismiss the indictment based on the alleged unconstitutionality/illegality of this Court's interim appointment.

The Court finds that the length of the Interim appointment of the United States Attorney violates Congress' intent in enacting 28 U.S.C. §§ 541 and 546. It is unnecessary, therefore, to engage in the analysis of the constitutional issues raised. Any mention of the Appointments Clause is done strictly with reference to Congress' enactment of these statutes in conformity with that clause. Considering that the distinctive characteristics of the modes of appointment established by Congress in sections 541 and 546(d) have been blurred in reaching the conclusion that this interim appointment is valid, we feel constrained to commence the discussion by referring to the text of the Appointments Clause, the language of these statutory provisions and the relevant case law.

The Appointments Clause of Article II of the Constitution reads as follows:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the appointment of such Inferior officers, as they think proper, in

> the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const., Art. II, § 2, cl. 2.

In *United States v. Germaine*, 99 U.S. 508, 509, 25 L.Ed. 482 (1878), the Court referred to the two modes of appointment stating that "[t]he Constitution for purposes of appointment very clearly divides all its officers into two classes." The Court referred to a "primary class [which] requires a nomination by the President and confirmation by the Senate." *Id.*, at p. 510. It then referred to the alternative mode of appointment to deal with particular situations, such as "sudden removals" or the sheer number of positions which made the first mode "inconvenient." It concluded "there can be but little doubt" . . . [t]hat all persons who can be said to hold an office under the government about to be established under the Constitution were intended to be included within one or the other of these modes of appointment." *Id.* Reaffirming this basic tenet, the Court in *Buckley v. Valeo*, 424 U.S. 1, 132, 96 S.Ct. 612, 46 L.Ed.2d 659, (1976) said: "all Officers of the United States are to be appointed in accordance with the Clause." (Emphasis in original). It added: "Principal officers are selected by the President with the advice and consent of the Senate. Inferior officers Congress may allow to be appointed by the President alone, by the heads of departments, or by the Judiciary" but "[n]o class or type of officer is excluded because of its special functions." *Id.*

The parties have cited no case, and the Court has found none, in which the mode of appointment by the

President with Senatorial confirmation has been challenged.[1] Joseph Harris, in the introduction to his book The Advice and Consent of the Senate; A Study of the Confirmation of Appointments of the United States Senate (1953) addresses this situation, stating:

> . . . No case has ever been taken to the Supreme Court to test the authority of Congress to require Senate approval of appointments, and it is unlikely that such a case will come before the Court. When the question has arisen collaterally, the Court has avoided ruling on the subject by holding that persons appointed by the President and confirmed by the Senate are "officers of the United States," and that those appointed otherwise are "inferior" officers. Although the federal courts have frequently interpreted the term "officer" as used in various federal statutes,

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[1] All of the constitutional challenges raised have been addressed to direct appointments of Inferior officers under the Excepting Clause of the Appointments Clause. *See Ex parte Siebold*, 100 U.S. 371, 25 L.Ed. 717 (1880) (the Court found that federal supervisors of elections were inferior officers for purposes of the Appointments Clause); *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 352-353, 51 S.Ct. 153-156, 157, 75 L.Ed. 374 (1931) (U.S. Commissioners were found to be inferior officers); *Morrison v. Olson*, 487 U.S. 654, 670, 108 S.Ct. 2597, 2608, 101 L.Ed.2d 569 (1988) (independent counsel appointed under the Ethics in Government Act is an inferior officer); *Freytag v. Commissioner*, 501 U.S. 868, 111 S.Ct. 2631, 115 L.Ed.2d 764 (1991) (held that special trial judges charged with assisting tax court judges were inferior officers and could be appointed by the chief judge of the Tax Court); *Edmond v. United States*, 520 U.S. 651, 665, 117 S.Ct. 1573, 1582, 137 L.Ed.2d 917 (1997) (judges of the Coast Guard of Criminal Appeals appointed by the Secretary of Transportation are inferior officers within the meaning of the Appointments Clause).

> these decisions do not indicate a uniform usage and, in any event, do not apply to the term as used in this section of the Constitution. The decision concerning which officers should be appointed by the President and confirmed by the Senate is essentially political in character and has appropriately been left to legislative rather than judicial determination."

Id. at p. 15. (Footnote omitted, emphasis ours.)

Mr. Justice Story observed in his Commentaries on the Constitution of the United States, (1991) that the propriety of the discretionary power granted to Congress by the Appointments Clause "cannot well be questioned" and that the limits of its discretion "could hardly admit of being exactly defined; and it might fairly be left to congress to act according to the lights of experience." *Id.* at pp. 384-85.

Courts and commentators have made statements that point to shared appointments as aiming at more qualified persons while the direct appointment is viewed as a practical means of dealing in a more agile manner with the business of government. Harris, for example, refers to the presidential appointments with Senate approval as including those officers who "provide the leadership, exercise general direction and control, and set the tone of the government" although recognizing that in that group are included "many subordinate officers and employees who do not determine policies but work under the direction and control of administrative superiors." *Id.* at p. 2. In 1903, the Supreme Court in *Shurtleff v. United States*, 189 U.S. 311, 315, 23 S.Ct. 535, 536, 47 L.Ed. 828 (1903), referred to the particular office involved in that case as

regarded by Congress "of sufficient importance to make it proper to fill it by an appointment to be made by the President and confirmed by the Senate," thereby classifying it "as appropriately coming under the direct supervision of the President . . . (and confirmed by the Senate) with reference to his constitutional responsibilities to see that the laws are faithfully executed." Mr. Chief Justice Taft in *Myers v. United States*, 272 U.S. 52, 161, 47 S.Ct. 21, 71 L.Ed. 160 (1926), observed that for forty years all postmasters were directly appointed by the Postmaster General under the Excepting Clause but Congress changed the mode of appointment to a presidential appointment with the consent of the Senate. He expressed that this was "an indication that Congress deemed appointment by the President with the consent of the Senate essential to the public welfare." In *Edmond v. United States*, 520 U.S. at 658, 117 S.Ct. at 1578, Justice Scalia refers to the mode of appointment which vests in the President the power to appoint principal officers with the consent of the Senate as a "disposition . . . designed to ensure a higher quality of appointments." And, citing Alexander Hamilton in The Federalist No. 77, he points to the public accountability ensured by the joint participation of the President and the Senate in the making of appointments. *Id.* The shared appointment is viewed as a mode which allows for heightened scrutiny of the qualifications of the person nominated for a position while the purpose for choosing the direct appointment method responds to considerations of "administrative convenience." *See Edmond*, at p. 660, 117 S.Ct. 1573, where the Court said that "administrative convenience . . . was

deemed to outweigh the benefits of the more cumbersome procedure, only with respect to the appointment of inferior officers."

Commenting on the appointing power which resulted in the "union of the Senate with the President," Hamilton in The Federalist No. 77 wrote:

> . . . Those who can best estimate the value of a steady administration, will be most disposed to prize a provision which connects the official existence of public men with the approbation or disapprobation of that body which, from the greater permanency of its own composition, will in all probability be less subject to inconstancy than any other member of the government."

In The Federalist No. 76 he defended this plan of appointment, stating that: "[i]t would be an excellent check upon a spirit of favoritism of the President, and would tend greatly to prevent the appointment of unfit characters from state prejudice, from family connection, from personal attachment, or from a view to popularity."

Referring also to the union of the Executive with the Senate in appointments, Justice Story said: "the most, that can be done, is to provide checks, and public responsibility. The plan of the Constitution seems to be as nearly perfect for this purpose, as any one can be." *Story, id.* at pp. 380-81.

The relevant statutes in issue before the Court, 28 U.S.C. §§ 541(a) and 546(d), follow the plan of appointments established by the Constitution in the Appointments Clause. The method of appointment chosen by Congress for United States attorneys in Section 541(a)

falls within the first class of officers described in the Appointments Clause which requires appointment by the President with the advice and consent of the Senate. The statute also established a fixed term of appointment of four years for that office and placed the power of removal on the President.[2] In Section 546 Congress determined that when the office of a United States Attorney became vacant in a district, the interim United States attorney would be directly appointed by the Attorney General for 120 days and, upon expiration of such term, the district court could appoint a United States attorney to serve until the vacancy was filled.[3] This mode of appointment

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[2] Title 28 U.S.C. § 541 reads:

(a) The president shall appoint, by and with the advice and consent of the Senate, a United States attorney for each judicial district.

(b) Each United States attorney shall be appointed for a term of four years. On the expiration of his term, a United States attorney shall continue to perform the duties of his office until his successor is appointed and qualifies. (c) Each United States attorney is subject to removal by the President.

[3] Title 28 U.S.C. § 546 reads:

(a) Except as provided in subsection (b), the Attorney General may appoint a United States attorney for the district in which the office of United States attorney is vacant.

(b) The Attorney General shall not appoint as United States attorney a person to whose appointment by the President to that office the Senate refused to give advice and consent.

(c) A person appointed as United States Attorney under this section may serve until the earlier of –

clearly falls within the Excepting Clause of the Appointments Clause.

In *Sotomayor*, Judge Fuste concluded "that United States Attorneys, including interim United States Attorneys, are 'inferior' officers for Appointments Clause purposes." *Sotomayor, id.* at 291. We understand that this conclusion subverts the Congressional enactment set forth in Sections 541 and 546 whereby Congress chose one mode of appointment for United States attorneys and another – totally different method – for interim United States attorneys.

The *Sotomayor* court justifies the fusion of these two methods of appointment, thereby reducing the legislative determination into a single method: that of direct appointment. It does this in two ways: (1) by relying on *United States v. Gantt*, 179 F.3d 782, 787-88 (9th Cir.1999); *United States v. Solomon*, 216 F.Supp. 835, 838-43 (S.D.N.Y.1963), and *Myers v. United States*, 272 U.S. at 129, 47 S.Ct. 21,[4] and (2) by using certain "indicia" set forth in

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(1) the qualification of a United States attorney for such district appointed by the President under section 541 of this title; or

(2) the expiration of 120 days after appointment by the Attorney General under this section.

(d) If an appointment expires under subsection (c)(2), the district court for such district may appoint a United States attorney to serve until the vacancy is filled. The order of appointment by the court shall be filed with the clerk of the court.

[4] Myers does not consider this subject matter at all.

Morrison, supra, in deciding what differentiates "principal" from "inferior" officers. The Court's analysis under the Appointments Clause section of the opinion disregards the fundamental fact that Congress chose for all United States attorneys the presidential/senatorial approval method of appointment which has been generally associated with principal officers, and that only by way of exception, in the unique circumstances of a vacancy, was the congressional choice of direct appointment to be applied. By classifying all United States attorneys as inferior officers, it has turned the exception into the rule and has annulled Congress' primary choice without any rationale basis for doing so.

We understand that *United States v. Solomon, supra,* which the ***Sotomayor*** Court states "approv[ed], in dicta, [the] constitutionality of predecessor statute to 28 U.S.C. § 546(d) based on United States attorneys being 'inferior officers,' " **69 F.Supp.2d at 289** (emphasis ours), does not stand for that proposition. The office involved in that case was that occupied by Mr. Vincent L. Broderick, who had been appointed by the Judges of the United States District Court for the Southern District of New York as the interim United States Attorney pursuant to the provisions of 28 U.S.C. § 506, the predecessor of section 546. Nowhere is the finding on the constitutionality of section 506 based on United States attorneys being inferior officers. The Court never expanded the scope of its determination to include United States attorneys. The factual basis was strictly limited to the interim position. It made clear "that the appointive power of the judiciary contemplated by section 506 in no wise equates to the normal appointive power . . . the judiciary's power is only of a

temporary nature . . . the appointment itself contemplates only a temporary mode of having the duties of the office performed until the President acts." *Solomon, id.* at p. 842. (Emphasis ours.)

In *Gantt*, the Court concluded that United States attorneys are inferior officers and at footnote five, page 787, categorically said that "[w]e do not distinguish between United States attorneys appointed pursuant to 28 U.S.C. § 541(a) and those appointed under 546(d)." Again, the end result of this is to abolish the mode of appointment chosen by Congress for all United States attorneys in section 541 – by the Executive with Senate approval – and to substitute it by a single method – that of direct appointments contemplated in the Excepting Clause and enacted in section 546(d) solely for Interim appointments. Both ***Sotomayor*** and *Gantt* engage in a discussion of the criteria set forth in *Morrison, supra*, and in *Edmond v. United States, supra*, to justify their classification of all United States attorneys as inferior officers. Indicators such as supervision or subordination to a higher ranking officer, control, power of removal, duties and tenure are applied to support the classification of those officers as "inferior."

The flaw in this analysis, as stated before, is that it does not take the obvious into account: that when Congress enacted section 541 and required a presidential appointment with senatorial confirmation for all United States attorneys it placed them in the scheme of appointment that the Constitution employed for Consuls, Justices of the Supreme Court and all other Officers of the United States and that, when it chose the direct appointment for interim United States attorneys upon enacting section

546(d), in accordance with the Excepting Clause, it chose an alternative type of appointment which has distinct features from the section 541 appointment. The congressional choice of appointment of United States attorneys vis a vis the choice for interim United States attorneys precludes their consolidation by judicial fiat. There is no leeway for erasing the boundaries of these two modes of appointment once Congress has established them, as it did in sections 541 and 546. That determination lies solely in the hands of Congress, and there is no room for questioning it.

Precisely because of this, the *Morrison/Edmond* criteria are irrelevant to the situation before us. Congress' selection of a presidential type appointment with Senate approval for all United States attorneys in section 541 precludes any consideration of a crossover from the section 541 type appointment to the section 546 mode. Declaring all United States attorneys inferior officers does not thereby invalidate the congressional determination of the two different types of appointment for United States attorneys and interim United States attorneys established in the law.

Gantt attempts to justify the consolidation of United States attorneys appointed under section 541 with those appointed under section 546(d), stating, at footnote five, that "section 546(d) appointments are fully-empowered United States attorneys, albeit with a specially limited term, not subordinates assuming the role of 'acting' United States attorneys." *Gantt, supra,* at p. 787. This claim contradicts *United States v. Eaton,* 169 U.S. 331, 343, 18 S.Ct. 374, 379, 42 L.Ed. 767 (1898) (cited with approval in *Morrison, supra,* at p. 2689, 108 S.Ct. 2597). There, the

Court approved Department of State regulations that allowed executive officials to directly appoint a "vice consul" in case a vacancy occurred in the office of the consul, notwithstanding that the Appointments Clause requires "Consuls" to be appointed by the President with the advice and consent of the Senate. The Court stated: "[b]ecause the subordinate officer is charged with the performance of the duty of the superior for a limited time, and under special and temporary conditions, he is not thereby transformed into the superior and permanent official." The performance of the full panoply of duties by the interim United States attorney who is temporarily filling a vacancy does not vest in that person the character of a "United States attorney" in "the broader and more permanent" sense of that office appointed as established by Congress in 28 U.S.C. § 541. *Id.*

Interim United States Attorney Gil-Bonar was a trial attorney with the United States Department of Justice when the Judges of this Court named him to perform the duties of the United States attorney on a temporary basis and under the exigent circumstances of a vacancy, pursuant to section 546(d). That neither converted Mr. Gil-Bonar into the United States Attorney of this District (the equivalent of "the superior and permanent official" in *Eaton*) nor did away with the need for a presidential appointment with the advice and consent of the Senate, as required by section 541(a), for the person who would hold that office.

Mr. Gil-Bonar has served in an interim capacity for a period of six years and five months. He has surpassed the fixed term of four years established for United States attorneys in section 541 by almost two and a half years.

During this prolonged interregnum, no political nominee has been submitted to the Senate for its consideration. The inactivity regarding the political appointment during a period which surpasses the limited tenure established by Congress for United States attorneys in section 541(a) has converted this provisional appointment into a de facto permanent United States Attorney, in violation of section 541(b). *See Valenti v. Rockefeller*, 292 F.Supp. 851, 855 (W.D.N.Y.1968) (where the Court, with reference to the discretion of the State concerning the timing of vacancy elections and the making of temporary appointments until then, observed that "[w]e would have difficulties . . . squaring the word 'temporary' with a statute providing that the . . . appointee is to serve out the remainder of a term regardless of its length).

This places our District in an anomalous situation. Mr. Gil-Bonar has never been subjected to public scrutiny before the Senate. The direct appointment method bypasses this requirement but only for officers designated on a temporary basis. His extended tenure, even beyond the section 541 time limitation, presents a problem of accountability. The idea of placing individual responsibility for certain appointments upon the Executive and the Legislature is forcefully discussed in Justice Scalia's dissenting opinion in *Morrison, supra*, at p. 2638, where he focuses on "the vast power and the immense discretion that are placed in the hands of the prosecutor with respect to the object of his investigation." To that end, he quotes at length from a speech given by Justice Robert Jackson when he was Attorney General to United States attorneys.

> 'If the prosecutor is obliged to choose his case, it follows that he can choose his defendants. Therein is the most dangerous power of the prosecutor: that he will pick people that he thinks he should get, rather than cases that need to be prosecuted. With the law books filled with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone. In such a case, it is not a question of discovering the commission of a crime and then looking for the man who has committed it, it is a question of picking the man and then searching the law books, or putting Investigators to work, to pin some offense on him. It is in this realm – in which the prosecutor picks some person whom he dislikes or desires to embarrass, or selects some group of unpopular persons and then looks for an offense, that the greatest danger of abuse of prosecuting power lies. It is here that law enforcement becomes personal, and the real crime becomes that of being unpopular with the predominant or governing group, being attached to the wrong political views, or being personally obnoxious to or in the way of the prosecutor himself.'

Morrison, Id. quoting R. Jackson, The Federal Prosecutor, Address Delivered at the Second Annual Conference of United States Attorneys, April 1, 1940.

Justice Scalia propounds that "the primary check against prosecutorial abuse is a political one," *id.*, since, given the political appointment of prosecutors, the blame if there is anything wrong with the selection falls upon the President who is elected by and accountable to the people.

The concept of public accountability for appointments is discussed by Hamilton in The Federalist No. 77.

> Upon a comparison of the plan for the appointment of the officers of the proposed government with that which is established by the constitution of this State, a decided preference must be given to the former. In that plan the power of nomination is unequivocally vested in the Executive. And as there would be a necessity for submitting each nomination to the judgment of an entire branch of the legislature, the circumstances attending an appointment, from the mode of conducting it, would naturally become matters of notoriety; and the public would be at no loss to determine what part had been performed by the different actors. The blame of a bad nomination would fall upon the President singly and absolutely. The censure of rejecting a good one would lie entirely at the door of the Senate; aggravated by the consideration of their having counteracted the good intentions of the Executive. If an ill appointment should be made, the Executive for nominating, and the Senate for approving, would participate, though in different degrees, in the opprobrium and disgrace.

The concern that the idea of responsibility not be lost was voiced by Attorney General Janet Reno herself in her remarks to the Senate Committee on Governmental Affairs regarding the Independent Counsel Act:

> Our Founders set up three branches of government: a Congress that would make the laws, an Executive that would enforce them, and a judiciary that would decide when they had been broken. The Attorney General, who Is appointed by

> the President and confirmed by the Senate, is publicly accountable for her decisions. . . .
>
> In contrast, the Independent counsel is vested with the full gamut of prosecutorial powers, but with little of its accountability. He has not been confirmed by the Senate. . . . Accountability is no small matter. It goes to the very heart of our constitutional scheme. Our Founders believed that the enormity of the prosecutorial power – and all the decisions about who, what, and whether to prosecutor – should be vested in one who is responsible to the people. That way – and here I'm paraphrasing Justice Scalia's dissent in *Morrison v. Olson* – whether we're talking about over-prosecuting or under-prosecuting, 'the blame can be assigned to someone who can be punished.'

J. Reno, Prepared Remarks presented before the Senate Committee on Governmental Affairs, March 17, 1999. (Emphasis added.)

The problem as described by Attorney General Reno is precisely the one confronted by this Court. The appointment of the United States Attorney in this District in compliance with the requirements of section 541(a) which places the responsibility for it in the hands of the President and the Senate is overdue. It is time that the Executive discharges the authority and assumes the responsibility vested upon this branch of government by Congress pursuant to 28 U.S.C. § 541(a). To further prolong this interim appointment constitutes an abdication of such duty. It is both unwise and unfair to abrogate the Congressional mandate set forth in section 541(a). We – the Executive, Legislature, and Judiciary – would do well

to heed the advice of Justice Frankfurter, as quoted by Attorney General Reno in her address to the Senate: "Wisdom too often never comes, and so one ought not to reject it merely because it comes late." *Id.*

Having determined that the interim appointment of United States Attorney Gil-Bonar is illegal since the length of such interim appointment violates Congress' intent in enacting sections 541 and 546, all delegation of the power to prosecute flowing from him to the Assistant U.S. Attorney in this case is, therefore, invalid. Congress vested in each United States attorney the duty to prosecute for all offenses against the United States. *See* 28 U.S.C. § 547. It also provided for appointment by the Attorney General of assistant United States attorneys or special attorneys to assist the United States attorney in the discharge of his statutory duties. The authority to prosecute ultimately resides in the United States attorney, as provided in section 547.

For the reasons stated, the Motion to Dismiss the Indictment filed by defendant Fermin Hilario (docket entry 99) is GRANTED, without prejudice. This order is applicable to defendant Hilario, who was the only defendant who sought dismissal on these grounds.

This Order is STAYED during the pendency of any appeal.

SO ORDERED.